



State of New Jersey  
GOVERNMENT RECORDS COUNCIL

101 SOUTH BROAD STREET  
PO BOX 819  
TRENTON, NJ 08625-0819

CHRIS CHRISTIE  
Governor

KIM GUADAGNO  
Lt. Governor

RICHARD E. CONSTABLE, III  
Commissioner

INTERIM ORDER

January 30, 2015 Government Records Council Meeting

Harry B. Scheeler, Jr.  
Complainant

Complaint No. 2014-59

v.

Woodbine Board of Education (Cape May)  
Custodian of Record

At the January 30, 2015 public meeting, the Government Records Council ("Council") considered the October 21, 2014 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council, by a majority vote adopted the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's response to the Complainant's OPRA request that there were no responsive records constitutes an insufficient search for the records subsequently located. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), May v. Twp. of Edison, (Middlesex) GRC Complaint No. 2007-165 (October 2007), Schneble v N.J. Dep't of Env't Prot., GRC Complaint 2007-220 (April 2008), Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), Weiner v. Cnty. of Essex, GRC Complaint No 2013-220 (March 2014).
2. The Custodian may have unlawfully denied access to the responsive truancy complaints by having provided only partly legible copies. N.J.S.A. 47:1A-6; Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011). As the issue was not addressed by the Custodian, and thus the record is unclear, he must either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original documents in his possession are of the same legibility as those already provided.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>1</sup> to the Executive Director.<sup>2</sup>**

<sup>1</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>2</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 30<sup>th</sup> Day of January, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: February 3, 2015**

---

record has been made available to the Complainant but the Custodian may withhold delivery of the record until the financial obligation has been satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
January 30, 2015 Council Meeting**

**Harry B. Scheeler, Jr.<sup>1</sup>  
Complainant**

**GRC Complaint No. 2014-59**

**v.**

**Woodbine Board of Education (Cape May)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:** Electronic copies via email of:

1. All requests for Due Process submitted to Woodbine Elementary Schools (“WES”) in 2012 and 2013
2. All truancy complaints filed by WES in court in 2012 and 2013.

**Custodian of Record:** Alan Parmalee

**Request Received by Custodian:** January 10, 2014

**Response Made by Custodian:** January 24 and January 27, 2014

**GRC Complaint Received:** January 28, 2014

**Background<sup>3</sup>**

**Request and Response:**

On January 10, 2014 the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above mentioned records. On January 16, 2014, five (5) business days after receipt of the request, the Custodian responded in writing advising that no such records existed. The Custodian also addressed other OPRA requests made by Complainant on January 10 and January 13, 2014.<sup>4</sup> On January 24, 2014, nine (9) business days after his receipt of the request, the Custodian provided the requested Due Process documents. On January 27, 2014, ten (10) business days after the receipt of the request, the Custodian provided copies of four municipal court complaints for truancy.

---

<sup>1</sup> No legal representation listed on record.

<sup>2</sup> Represented by Susan Hodges, Esq. of Archer & Greiner (Haddonfield, NJ).

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

<sup>4</sup> The Custodian’s initial letter response addressed two other OPRA requests by Complainant. To those “remaining items” in these requests, the Custodian advised he needed an extension until January 24, 2014. Complainant may have believed the extension applied to the relevant records here, and granted an “additional extension” to January 27, 2014.

### Denial of Access Complaint:

On January 28 2014, the Complainant filed a Denial of Access Complaint with the Government Records Council (“GRC”). The Complainant asserted that although the requested records were provided to him on January 24, 2014, and January 27, 2014, respectively, the Custodian originally denied the records existed. Further the truancy complaints provided on January 27 were only partially legible.

### Statement of Information:

On March 10, 2014, the Custodian filed a Statement of Information (“SOI”). The Custodian certified he received the Complainant’s OPRA request on January 10, 2014. The Custodian also certified that he provided the relevant documents to Complainant on January 24 and January 27, 2014.

### Additional Submissions:

On June 4, 2014, the Complainant stated that he advised the Custodian via a January 31, 2014 email that the copies of the truancy complaints provided to him were “barely readable.” The Complainant further requested that the Custodian compare the copies of documents provided to him to the original documents to determine if they are consistent in legibility. The Custodian never replied.

## Analysis

### Insufficient Search

A custodian is obligated to search for and find identifiable government records listed in an OPRA request. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007). In May v. Twp. of Edison (Middlesex), GRC Complaint No. 2007-165 (October 2007) the complainant requested schematic floor plans of Edison High School. The custodian initially denied the request by stating the request had to be made to the Board of Education. After the Denial of Access Complaint was filed, the custodian made the records available to complainant and indicated she misunderstood the request, thinking they were for Board of Education records. The Council held that “[e]ven though the Custodian eventually made the requested floor plans available to the Complainant after she realized that the initial denial was a mistake, the Custodian violated OPRA by denying the Complainant access to the requested records.”

In Schneble v. NJ Dep’t of Env’t Prot., GRC Complaint 2007-220 (April 2008), the custodian initially responded to the OPRA request by stating that no responsive records existed. The complainant, however, as part of her Denial of Access complaint, submitted emails which were responsive to her own request. The custodian certified that upon receipt of the e-mails attached to the Complaint, he again searched through DEP files and this time found records responsive to the request. The GRC held that because the custodian performed an inadequate initial search, he unlawfully denied access to the requested records.

Further, in Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), the Council held that the custodian denied access as a result of an initial inadequate search pursuant to complainant's OPRA request and failed to bear the burden of proving due diligence in searching for the records. Specifically, a search one year after the initial search located the records in the same area within an office that the custodian admitted having looked through a year earlier.

Most recently, in Weiner v. Cnty. of Essex, GRC Complaint No 2013-220 (March 2014), the complainant requested emails relating to the presence of County employees at certain events. The custodian initially denied the request stating there were no responsive records. However seven (7) business days later, the custodian provided two responsive records consisting of emails obtained from the Essex County Youth Services Commission and Division of Housing and Community Development. The Council determined that to be an unlawful denial of access. The Council reasoned that "it is among a custodian's duties to perform a complete search for the requested records before responding to an OPRA request as doing so will help ensure that the Custodian's response is accurate and has an appropriate basis in law." Id. at 3.

As in Lebbing, and Weiner, the Custodian here advised the Complainant on January 16, 2014, that no responsive records existed. The Complainant advised the Custodian that he had personal knowledge of the existence of such records and urged the Custodian to check more thoroughly. Only after the Complainant discussed the matter with the Board's attorney were the records provided. The Custodian did not dispute those assertions. More significantly, the Custodian's SOI offered no explanation regarding how the search was conducted.

Therefore, the Custodian's response to the Complainant's OPRA request that there were no responsive records constitutes an insufficient search for the records subsequently located. Weiner, GRC 2013-220; Schneble, GRC 2007-220.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011) the custodian provided records to the complainant which were partially illegible, but provided the fully legible records as part of the SOI and thus legible records existed at the time of the complainant's OPRA request. The Council held "the [c]ustodian's provision of illegible records to the [c]omplainant in response to the OPRA request when legible records existed constituted a limitation on the right of access accorded by OPRA pursuant to N.J.S.A. 47:1A-1 and a violation of OPRA."

Here, as in Lopez, the records of the truancy reports for 2012-2013 are faint and difficult or impossible to read. The Council cannot determine if the records provided are of the same quality of those in the possession of the custodian. The Custodian has not explained the circumstances of such nor the reason for the illegible documents.

Therefore, the Custodian may have unlawfully denied access to the responsive truancy complaints by having provided only partly legible copies. N.J.S.A. 47:1A-6; Lopez, GRC 2009-267. As the issue was not addressed by the Custodian, and thus the record is unclear, he must either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original documents in his possession are of the same legibility as those already provided.

### **Knowing and Willful**

The Council defers analysis as to whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's response to the Complainant's OPRA request that there were no responsive records constitutes an insufficient search for the records subsequently located. Donato v. Twp. of Union, GRC Complaint No. 2005-182 (February 2007), May v. Twp. of Edison, (Middlesex) GRC Complaint No. 2007-165 (October 2007), Schneble v N.J. Dep't of Env't Prot., GRC Complaint 2007-220 (April 2008), Lebbing v. Borough of Highland Park (Middlesex), GRC Complaint No. 2009-251 (February 2011), Weiner v. Cnty. of Essex, GRC Complaint No. 2013-220 (March 2014).
2. The Custodian may have unlawfully denied access to the responsive truancy complaints by having provided only partly legible copies. N.J.S.A. 47:1A-6; Lopez v. Cnty. of Hudson, GRC Complaint No. 2009-267 (March 2011). As the issue was not addressed by the Custodian, and thus the record is unclear, he must either provide fully legible copies of the truancy complaints to Complainant or provide a certification that the original documents in his possession are of the same legibility as those already provided.
3. **The Custodian shall comply with item No. 2 above within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance, in accordance with N.J. Court Rule 1:4-4,<sup>5</sup> to the Executive Director.<sup>6</sup>**

---

<sup>5</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

<sup>6</sup> Satisfactory compliance requires that the Custodian deliver the record(s) to the Complainant in the requested medium. If a copying or special service charge was incurred by the Complainant, the Custodian must certify that the record has been made available to the Complainant but the Custodian may withhold delivery of the record until the financial obligation has been satisfied. Any such charge must adhere to the provisions of N.J.S.A. 47:1A-5.

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Ernest Bongiovanni, Esq.  
Staff Attorney

Approved By: Dawn R. SanFilippo, Esq.  
Acting Executive Director

October 21, 2014<sup>7</sup>

---

<sup>7</sup> This complaint was prepared for adjudication at the Council's October 28 and November 18, and December 16, 2014 meetings, but could not be adjudicated due to lack of quorum.  
Harry B. Scheeler, Jr. v. Woodbine Board of Education (Cape May), 2014-59 - Findings and Recommendations of the Executive Director